Supreme Court, U.S.
FILED

02-1853 JUN 18 2003

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 2003

Edward Kennedy and Catherine Singer, Petitioner,

v.

Richard Hughes, Walter Dasheno, Edwin Tafoya, Dale Baca, Charles Suazo, Joseph Val Gutierrez, C. Anthony Suazo, Jose N. Chavarria, John Shije, Francis Tafoya, Alvin Warren, Denny Gutierrez, and George Gutierrez, Respondents.

On Petition for a Writ of Certiorari to the
Unites States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question presented is whether the decision in the Tenth Circuit set a precedent which allows Tribes to single-out and violate nonmembers constitutional rights.

Another question presented is whether the district court incorrectly interpreted this Court's rule regarding the requirement to exhaust remedies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEAL FOR THE TENTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's opinion, (per Johnson, D.J.) granting respondent's motion to dismiss (Appendix ("Pet. App.") 1a-2a) Memorandum opinion. The court of appeals' opinion (per Baldock J., McConnell, J., Lucero, C.J.) is published at 60 F. Appx. 734.

STATEMENT OF JURISDICTION

The court of appeals entered its order March 19, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The provisions of the Indian Civil Rights Act of 1968, 25 U.S.C. §1302 et seq., relevant to this petition are printed in the Appendix at 13a-14a.

STATEMENT OF THE CASE

Petitioner filed a civil complaint to contest the Santa Clara tribe's regulatory authority over him. Because he had been found in contempt by Respondents tribal court and incarcerated for 33 days due to his failure to pay two civil judgments totaling $15,000 within ten days. Later held by this Court "central to this aspect of the case's out holding in *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); "As to nonmembers . . . a tribes adjudicatory jurisdiction does not exceed its legislative jurisdiction . . .". That formulation leaves open the question whether a tribe's adjudication over nonmember defendants equals its legislative jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001). "Where nonmembers are concerned the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Oliphant v. Squamish Tribe*, 435 U.S. 191 (1978).

REASONS FOR GRANTING THE WRIT

Several compelling reasons exist for this Court to grant a writ of certiorari in this case. First, the Tenth Circuit's judgment to refuse to find jurisdiction in the Petitioner's

claim sets a precedent to allow Indian tribes to single-out for punishment and violate a nonmember's constitutional rights. Also, the Tenth Circuit's decision allows a tribe's contracted independent legal counsel to conspire with such tribes to create bills of attainder and other tribal legislation. These acts by Respondent eliminated previously surrendered sovereign immunity in the tribal court in order to avoid suit. Such a decision also allows tribal counsel to hide behind a bad faith creation of sovereign immunity after counsel has instigated such action.

Second, the Tenth Circuit's judgment ignores the rules created in this Court's opinions over the years on the requirement of exhaustion of remedies. To allow the Tenth Circuit's judgment to stand would defy any notion of justice and fairness in the American judicial system due to the acts of both the Santa Clara Tribe and their contracted independent legal counsel to systematically eliminate any remedy the Petitioner should have to address the harm done to him by the Respondents. The Santa Clara Tribe and their counsel have acted to personally harm the Petitioner and to use any means to avoid responsibility for their actions and the actions of their agents.

I. The Decision Below Sets A Precedent Which This Court Should Immediately Respond To Because It Allows Tribes To Single-Out And Violate Nonmembers Constitutional Rights.

The most significant portion of the record below, which was not thoroughly considered by the Tenth Circuit is that the Santa Clara Tribe had waived their defense of sovereign immunity by tribal law. The record below reflects that once the Tribe learned, through their tribal counsel, that they could "win their case" against Petitioner's case by enacting a new tribal law, they immediately did so. Another important fact illustrated by the record is that the Petitioner was actually successful in his appeal to the Santa Clara Appellate

Court. The Tribe then, again with the advice of counsel, acted to limit the Petitioner by abolishing the appellate court and conceal the decision in favor of the Petitioner.

The Tenth Circuit court held that no jurisdiction existed over Petitioner's claim under the rule established in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Tenth Circuit failed to recognize that the rule in *Santa Clara* does not apply to this case because Petitioner is not a member of the Santa Clara Indian tribe but resides on the reservation. Petitioner is for all intent and purposes considered an "Indian" under the ICRA as a member of the Blackfeet Indian Tribe, but as a non-member residing the Santa Clara Pueblo, his access to remedies is significantly limited. This is an important distinguishing factor between this case and *Santa Clara*. In *Santa Clara*, the matter before this Court was one not only of an internal tribal nature but all parties to the suit were members of the Santa Clara Indian tribe. This Court found that all had access to such remedies to the tribe's elected officials and courts. Petitioner, as a resident of Santa Clara Pueblo, has some access to the tribal courts, but outside of this limited resource, petitioner has no other access to the governing body of Santa Clara Pueblo as a member of the tribe would have.

Another distinguishing factor in this case is that the matter before the court does not relate to those subjects which both the Supreme Court and the U.S. Congress have ruled to be exclusively governed by Indian tribes. More specifically, this Court has, since the late 1970's, given significant clarification to the kind of civil jurisdiction tribal courts can exercise. This Court beginning with *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), discussed the differences between members of Indian tribes who reside on the reservation and those who are non-member residents. This Court stated, "nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the

governing tribes. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation." *Id.* at 161. This Court found that in most instances non-member Indians saw a lack of access to the governing body of the reservation in which they reside. For these reasons non-members receive different considerations by courts which preside over actions by them against Tribal courts and officials.

This principle persists and has been used in the courts regarding claims where a nonmember Indian in a civil action is concerned. In *Kaul v. Stephan*, 83 F.3d 1208, (10th Cir. 1996), the Tenth Circuit stated, "The Supreme Court has recognized a distinction between Indians and nonmember Indians in several contexts, and has for most practical purposes treated non-member Indians in the same manner as non-Indians." *Id.* at 1218. This principal has also been recognized in other jurisdictions. The court in the District of South Dakota stated: "In civil cases arising from Indian reservations, non-member Indians, already residing on a reservation, are treated as non-Indians as to the affairs of that reservation." *Christian Children's Fund Inc. v. Crow Creek Sioux Tribal Court*, 103 F.2d 1161, 1165 (D.S.D. 2000).

A more illustrative and binding precedent exists in this Court's opinion in *Nevada v. Hicks*, which gives great detail to the differences regarding non-members residing on another tribe's reservation as well as synthesizing other important cases involving this principle from *U.S. v. Montana*, 450 U.S. 544 (1981), *U.S. v. Oliphant*, *Strate v. A-1 Contractors*, and *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985). In *Hicks*, this Court stated as a general rule regarding non-members that, "Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*...". *Hicks* at 2309. This Court went on to state, "Where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so

cannot survive without express congressional delegation'." *Id.* at 2309-2310.

As to the exercise of tribal authority over petitioner, such an exercise of power by the tribe does not serve to protect its' interests of self-government. As this Court, also, stated in *Hicks*, "Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." *Id.* at 2314. This Court also recited the list of the matters for which the tribe has a greater interest so that its use of inherent sovereignty would be logically served. Those instances are as stated by the Court, "First, a tribe may 'regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements And second. A tribe may regulate nonmember conduct that 'threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe.' But unless one of these exceptions applies. The 'general proposition' governs and the tribe's civil jurisdiction does 'not extend to the activities of nonmembers of the tribe.'." *Hicks,* concurrence by Justice Souter at 2320-2321.

These illustrations by the Court give guidance to courts considering actions taken against uses of tribal authority. In this case, this Court should recognize that Santa Clara's action regarding the Petitioner in no way relate to those principles of necessary tribal authority. The claims by the petitioner in this case, also, do not relate to contractual or business relations with Santa Clara. Nor do they relate, as stated previously, to an internal matter normally left to the authority of the governing body of the tribe.

II. The District Court incorrectly interpreted this Court's rule regarding the requirement to exhaust remedies.

The Tenth Circuit held that Petitioner had not exhausted his remedies as regarding other courts and, therefore, it had no jurisdiction to hear the claims. This doctrine was established by this Court in, *National Farmers Union*, to allow the tribal courts to deal with matters pertaining to it, authority over certain claims. But in this case the Petitioner its effect only helps to eliminate our claims against the Respondents. In an examination of Chief Judge Norman Singer's declaration of the Santa Clara Court of Appeals, several statements allude to the elimination of one remedy, the Santa Clara Court of Appeals, to the Petitioner after a ruling by it in favor of the Petitioner for remand to its tribal court against the Respondents. In the *Hicks* opinion, this Court addressed the consideration of exhaustion. Normally the Court would allow for certain claims which align themselves to *National Farmers*, but this Court also stated, "In *National Farmers Union* we recognized exceptions to the exhaustion requirement, where 'an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, … or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction…'." *Hicks* at 2315. Not only have the respondents attempted to eliminated remedies to the petitioner they have also acted with prejudice against his claims to eliminate them completely. As shown by a declaration by former Pro Tem Judge for Santa Clara Christopher Harrington, Santa Clara has continually and intentionally made attempts to delay this action against them. These attempts to delay led to the resignation of Judge Harrington.

That is what this Court in *Hicks* found to be most troublesome. As this Court stated. "…we added a broader

exception in Strate: '[w]hen ... it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule,' so the exhaustion requirement 'would serve no purpose other than delay." *Id.* at 2315. The Santa Clara court did delay the actions put forth by the Petitioner in an attempt to circumvent the appellate decision against them in their Santa Clara Court of Appeals.

Chief Judge Singer asserted the decision and remand against Santa Clara tribal officials were later disregarded by Santa Clara tribal officials despite the Santa Clara Appellate Court's remand for trial of Petitioner's claims. He also corroborated Judge Harrington's statements regarding intentional delay by Santa Clara officials. Judge Singer asserted that, actions taken by the Santa Clara Tribal Council Respondent Richard Hughes' advice and counsel was to ignore Petitioner's claims. Judge Singer statements establish that the Santa Clara Tribal Council, with its attorney's advice, first attempted to eliminate the tribe's waiver of sovereign immunity which existed when Petitioner filed his claim against Santa Clara. Judge Singer asserts that following attempts to delay or eliminate Petitioner's claims the Santa Clara Pueblo Council eliminate the tribe's Court of Appeals which, rendered the opinion against them remanding Petitioner's claims for trial. Not only have the issues of a lack of access which concerned this Court in past opinions occurred here, but there is an actual attempt by the Respondent's to eliminate any recourse for the Petitioner through the use of governmental and legislative action.

The declarations of Judge Harrington and Signer illustrate that not only does the petitioner lack in the normal remedies of a tribal member but that those remedies have been systematically prejudiced or eliminated by the Respondents. As illustrated in *Hicks*, when a tribe acts in a manner of delay or bad faith Petitioner should be granted some means in which to remedy his claim.

CONCLUSION

The petition for a writ for certiorari should be granted.

Respectfully Submitted,

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